IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1017 OF 1988.
ALONG WITH
SUO MOTU PETITION NO. 6 OF 1988.
AND
CRIMINAL APPEAL NO.97 OF 1989.

Cr.A.No.1017/1988.

Razak Shaikh @ Gaffar @ Mallu
residing at Khadkali, 1340, ... Appellant.
Nashik. (Org.Accused.)

Versus.

The State of Maharashtra. .... Respondent.

Ms.Sharmila Kaushik for the Appellant.

Mr.D.S.Mhaispurkar, A.P.P. for the Respondent.

Sou Motu Petition No.6/1988

The State of Maharashtra. .... Appellant.

Versus.

Razak Shaikh @ Gaffar @ Mallu. .... Respondent.

Mr.D.S.Mhaispurkar, A.P.P. for the Appellant.

Ms.Sharmila Kaushik for the Respondent.

Cr.A.No.97/1989.

The State of Maharashtra. ... Appellant.

Versus.

Razak Shaikh @ Gaffar @Mallu. ... Respondent.

Mr.D.S.Mhaispurkar, A.P.P. for the Appellant.

Ms.Sharmila Kaushik for the Respondent.

CORAM ; SMT.RANJANA DESAI, &
ABHAY S. OKA, JJ.

DATED : 5th November, 2004.

ORAL JUDGMENT (Per Smt.Ranjana Desai, J.).

1. The appellant (the accused, for convenience) was tried in the Court of the Second Addl.Sessions Judge at Nashik in Sessions Case No.137 of 1988 for offences punishable under sections 363, 376 read with section 511 and 323 of the Indian Penal Code (for short, "the IPC") on the allegation that on or about 22nd February 1988 at about 6 p.m. in the area of Khadkali, Nashik, he kidnapped Afrin daughter of Usufkhan Pathan, a 9 year old girl from lawful guardianship of her mother Shamabi wife of Usufkhan Pathan, P.W.1, and attempted to commit rape on her and in such an attempt he made Afrin to fall down on the cot, removed salvar from her person, and tried to commit rape on her. The accused also voluntarily caused hurt to Afrin (P.W.7) and her brother Nasirkhan (P.W.5).

2. At the trial the prosecution case was as follows:

. P.W.7 Arfin, her sisters, brother and mother reside at Khadkali at a distance of about 50 to 60 paces from the accused Razzak @ Mallu. At the time of incident

Arfin was studying in the 4th standard at National High School in Nashik Urdu medium. She came to her house at about 5.00 p.m. from the school on 22 February 1988 and went to play along with other children. When she was playing near the house of the accused, the accused gave her two coins of the denomination of Re.1/- and told her to bring 8 annas worth samosa for him and keep the remaining amount with her. The accused also asked Afrin to sweep his room. While she was sweeping the room, he closed the doors from inside. One Nazma was residing in the adjoining room of the accused. She was a tenant of that room. That room was closed from outside. There was a door on the wall which separates the room of the accused and the room of Nazma.

3. The accused lifted Afrin when she was sweeping and made her lie down on the cot in that room. The accused untied the salvar (Muddemal Article 4) and pulled it down upto her knees. The accused then removed his lungi (Muddemal article 1) and lied on the person of Afrin. He was about to commit rape on her.

4. In the meantime Shamabi (P.W.1) found that her daughter was not in her house. So she asked her son Nasirkhan to find where Afrin was. Nasirkhan asked the children playing in front of the house of the accused as

to where Afrin was and one of the children i.e. Shaista told him that Afrin was inside the house of the accused. Nasirkhan went to the door of the room of the accused and peeped through the chink of the door. He found Afrin lying on the cot having her salvar on her person pulled down upto her knees. He also saw the accused lying down on the person of Afrin. Nasirkhan immediately rushed to the mother and told her what he had seen. Thereafter Shamabi (P.W.1), Nasirkhan (P.W.5), and one lady from neighbourhood rushed to the house of the accused and knocked the door. The accused started abusing and threatening them from inside the room. He told them that he would kill them if they entered the house. The accused also told them that he would open the door and asked them to wait.

5. After Nasirkhan and others started knocking at the door, the accused made Afrin put on her clothes and he left Afrin in the bathroom which was in possession of Nazma by opening Nazma's door. He then closed that door and opened the main door of his house. The moment Nazirkhan entered the house, the accused delivered a stick blow at the right hand of Nazirkhan. The accused told everybody that Afrin was not in his house. In the meantime Nazma reached the spot and she brought Afrin out from her bathroom. Afrin was in a frightened

condition. Shamabi and Nazirkhan took Afrin to their house and in their presence Afrin narrated the incident which had taken place inside the room of the accused. P.W.6 Niyaskhan was also present there. Thereafter Shamabi and Nazirkhan took Afrin to the Bhadrakali Police Station. Shamabi gave information to the Police. P.S.I. Ramseh Chaudhari (P.W.9) recorded the complaint of Shamabi which is at Exh.11. This complaint is recorded at about 7.05 p.m. On the basis of the said complaint investigation started. Accused was arrested. Clothes of the accused and Afrin were seized. They were chemically examined. After completion of the investigation the accused came to be charged as aforesaid.

6. In support of the case, the prosecution examined ten witnesses. Prosecution examined prosecutrix Afrin who is P.W.7. Prosecution also examined her mother Shamabi (P.W.1), her brother Nasirkhan (P.W.5), and neighbour P.W.6 Niyazkhan. Dr.Prakash Patil who was attached to the Civil Hospital, Nashik as Medical Officer has given details about the medical examination of Afrin. Details of the investigation has been given by P.W.9 P.S.I. Ramesh Chaudhary and P.W.10 Deputy Superintendent of Police Tukaram Chavan.

7. Defence of the accused was one of denial. His case is that he has been falsely implicated. After perusing the evidence, the learned Sessions Judge convicted the accused for offence punishable under sections 636, 376 read with sections 511 and 323 of the IPC. So far as offence under sections 363, 376 read with section 511 of the IPC is concerned, the accused has been sentenced to suffer R.I. for a period of one year and with a fine amount of Rs.100/- on each count. The accused was also sentenced to suffer R.I. for a period of three months for the offence punishable under section 323 of the IPC. All the substantive sentences were ordered to run concurrently. In default of payment of fine on each count imposed on the accused, the accused was to suffer R.I. for 15 days.

8. Being aggrieved by the said Judgment and Order of conviction, the accused has preferred this appeal. Criminal Appeal No.97 is preferred by the State of Maharashtra for enhancement of sentence. It appears that on 28 November 1988 this Court had issued notice to the accused to show cause as to why sentence imposed by the trial Court in this case should not be enhanced. The said notice is numbered as Suo Motu Petition No.6 of 1988. Since the facts involved in this case are the same and same law points arise, it will be convenient to

dispose them all by a common judgment and hence this common judgment.

9. We have heard at considerable length Ms.Sharmila Kaushik, learned Counsel appearing for the accused and Mr.Mhaispurkar, learned A.P.P. for the State. With the assistance of the learned Counsel we have gone through the entire evidence and record of the case.

10. Ms.Kaushik contended that the evidence of the prosecutrix Afrin is not reliable. She submitted that there are number of omissions and embellishment in the evidence and no corroboration is found to the said evidence from the other evidence on record. The learned Counsel also contended that the evidence of Shamabi P.W.1 mother of the prosecutrix and evidence of P.W.5 Nazirkhan also does not inspire confidence. She submitted that both these witnesses are prone to exaggeration. P.W.5 Nazirkhan's story that he saw the incident through the chink of the door is improbable. In his police statement Nasirkhan has omitted to say that he saw through the chink of the door and found that salvar on the person of Afrin was removed. He also omitted to say that the children playing outside the house of the accused told him that Afrin was inside the house of the accused. The learned Counsel submitted

that panchanama of the scene of offence does not refer to any such chink in the door through which the brother of the prosecutrix could have seen the incident. This is an improvement made by this witness to pose himself as an eye witness. The learned Counsel also contended that both the witnesses have stated that the prosecutrix was in the bathroom of Nazma and Nazma brought her out. However, Nazma has not been examined. Nazma was an independent witness. The fact that the prosecution has not examined Nazma indicates that the prosecution is trying to suppress the true story. The learned Counsel contended that there is no clear evidence as to the position of the door between the house of Nazma and the house of the accused and whether the door was in fact opened. She submitted that Afrin has omitted to say before the police that the accused unlocked the lock of the said door. The learned counsel therefore urged that it is quite possible that the prosecutrix was in the house of Nazma and rape was committed by someone else in the said house. She further submitted that it is also not clear as to whether the clothes of the prosecutrix were seized at the hospital or in the police station. That creates doubt as to whether they were really the clothes of the prosecutrix. The learned Counsel further submitted that even the medical evidence does not inspire confidence and hence the order of conviction and

sentence deserves to be set aside.

11. The learned A.P.P. on the other hand contended that not only the conviction be confirmed but the sentence deserves to be enhanced. He submitted that the evidence of the prosecutrix is cogent and consistent and it inspires confidence. The accused can be convicted solely on that evidence and it is not necessary to look for corroboration from other evidence to lend assurance to that evidence. He submitted that the medical evidence unmistakeably establishes that the accused tried to commit rape on the prosecutrix. He also submitted that Shamabi would never have lodged a complaint involving her minor daughter if the incident had not been true. He also contended that in the facts and circumstances of the case, the learned trial Judge ought not to have taken such a lenient view of the matter. He drew our attention to the decision of the Supreme Court in **State of Maharashtra v. Rajendra Jawanmal Gandhi, 1997 Cr.L.J. 4657**. The learned Counsel contended that the sentence be enhanced suitably.

12. We have given our anxious consideration to the submissions advanced by both sides. We would first concentrate on the evidence of the prosecutrix P.W.7

Afrin. At the relevant time Afrin was studying in the 4th standard. She has stated that on the date of incident she had come from the School at about 5.00 p.m. At about 6.00 p.m. her mother, sister, father and brother were in the house and she was playing near the house of the accused. Shahista and other friends were also playing with her. The accused came to her and told her to bring samosa for him. The accused gave her two coins each of the denomination of Re.1/-. The accused told her that she should keep 1-1/2 rupee and bring samosa worth 8 annas. She did not bring samosa. The accused made her sweep his room. She swept part of the room. The accused then closed the door. He made her lie on the cot. The accused untied her salvar, pulled it down upto her knees. She told him not to do so. But the accused beat her. Then the accused tried to lie on her. He put his private parts on her private parts. She shouted. The accused shut her mouth. The accused told her that if she shouts he will kill her. By the time her brother knocked at the door. The accused got up from her person. She put on her salvar and the accused removed lock of the inner door and opened that door and made her sit inside the bathroom beyond that room. The accused told her that in case she shouts he will kill her. Her brother searched for her. He could not find her. Nazma came there. She caught her hand

and made her get up. Her brother Nazirkhan and mother were present there. Some other persons were also present there. Her mother took her to their house. She narrated the entire incident to her mother and her brother and thereafter she was taken to the police station where her mother lodged complaint. She was thereafter taken to the Civil Hospital, where the doctor examined her. When muddemal article No.3 and 4 i.e. shirt and salvar respectively were shown to her, she identified them as her clothes. She also identified the lungi, muddemal article No.1 which was worn by the accused.

13. In the cross-examination she has stated that the accused was a frequent visitor to her house. She has stated that at the time of the marriage of her sister Sharin, their guests had stayed in the house of the accused. The accused had gone to bring her sister after the marriage. She has also stated that there is one water tap in the house of the accused and sometimes her sister used to bring water from that tap. No material omissions have been brought on record in her cross-examination. In fact we find her evidence to be straightforward and convincing. She has clearly stated that as the accused attempted to commit rape on her, her brother knocked at the door and the accused opened the

door between his room and the room of Nazma and made her sit in the bathroom of Nazma. The omission is only as regards her stating that the accused broke down the lock on the door situated in the wall between his room and the room of Nazma. She has also omitted to say that when the accused lifted her she shouted. In our opinion, these are insignificant omissions which do not affect the credibility of the prosecutrix. We have no manner of doubt that since the relationship between the accused and the family of prosecutrix was cordial, the prosecutrix trusted him and therefore, she went inside his room. He gave her two rupees and lured her into coming inside his room. He then committed breach of her trust and tried to commit rape on her. This prosecution story is told in clear and unambiguous terms by the prosecutrix. We find no difficulty in placing implicit reliance on this evidence. It is well settled that the prosecutrix being the victim of the offence cannot be treated as an accomplice. Her testimony, if it inspires confidence, can be relied upon without corroboration. It is only if the Court feels that some assurance is needed to her testimony that the Court has to look into the other evidence. The evidence of the prosecutrix proves the prosecution case.

14. Though we are of the considered opinion that we

could solely rely on the evidence of the prosecutrix, we would also refer to the evidence of her mother and brother.

15. Her mother, P.W.1, Shamabi has corroborated her in all material particulars. She has stated that on the material date, the prosecutrix was playing outside the house of the accused. She asked her son Nazirkhan as to where Afrin was. Nazirkhan came back and told her what he had seen in the house of the accused. Nazirkhan told her that he found the accused sleeping on Afrin inside his house. She along with the son rushed to the house of the accused. They knocked at the door of the accused. The accused threatened to kill them. The accused opened the door. They did not see Afirn there. Afrin was found sitting in the bathroom. That bathroom was in the room where Nazma resides. Nazma took out Afrin from that bathroom. Afrin was in a frightened condition. She was taken home where she narrated the incident to her mother and others. This witness went to the police station and lodged a complaint, which is at Exh.11. It is pertinent to note that the complaint was recorded at 7.05 p.m. i.e. immediately after the incident. There are hardly any material omissions in the evidence of this witness. She has only omitted to say that her son Nazir had clamped

around her neck, when he came back on the day of incident and that the accused told her from inside his room that he was taking bath and asked them to wait and that they knocked on the door of the accused. These are minor omissions which can never have any adverse impact on the prosecution case. On the core of the prosecution case, this witness is totally consistent. Some argument was advanced as regards the position of the door and the alleged confusion as to whether the door was opened by the accused. This witness has clearly stated that there was a wall in between the room of the accused and the room of Nazma and in that wall there was a door. She has also stated that the door was latched by the accused from his side and Nazma had also latched it from her side. She has also stated that Afrin was taken inside the bathroom by Nazma. In the scene of offence panchanama also there is mention of this door.

16. We find no hesitation in relying on the evidence of this witness. In our opinion, we feel that a mother would never involve her minor daughter in a false case of attempted rape for fear of stigma. In **State of Rajasthan v/s. N.K., (2000) 5 SCC pg. 30**, in a similar situation the Supreme Court has observed that a father would not ordinarily subscribe to a false story of sexual assault involving his own daughter and thereby

putting at stake the reputation of the family and jeopardizing the married life of the daughter. In this case also nothing has been suggested in the cross-examination as to why the witness is deposing against the accused. In our opinion therefore, the evidence of P.W.1 Shamabi gives assurance to the evidence of the prosecutrix.

17. P.W.5 Nasirkhan, brother of the prosecutrix, has also supported and corroborated the case of the prosecutrix. He has stated that after his mother told him as to where Afrin was, he came out of his house. The children told him that Afrin was inside the house of the accused. He went near the house of the accused. He saw through the chink of the door. He found that Afrin was lying on the cot and the accused was trying to rape her. The accused had fallen on her person. He immediately rushed to his mother and told her about it. All of them went to the house of the accused and they knocked on the door of the house of the accused. Then the accused opened the door. When he entered the house of the accused, the accused hit him with a stick on his right arm. Afrin was found in the bathroom of another room. She was in a frightened condition. When muddemal articles 3 and 4 i.e. shirt and salvar were shown to him, he identified that they were the clothes worn by

Afrin. Exh.24 is the medical certificate issued by Dr.Patil who examined Nasirkhan. Dr.Patil in his evidence has stated that he had examined Nasirkhan on 22nd February 1988 at 8.20 a.m. i.e. immediately after the incident. Dr.Patil found abrasion on the right forearm posterior reddish in colour having 2 c x 2 cm size caused by hard and blunt object within six hours before the examination. This establishes that Nasirkhan's story that he was assaulted by the accused. In the cross-examination of this witness he has reiterated the same story. There are some minor omissions in his evidence, such as about chink of the door; that he had asked the children as to where Afrin was; that Shaista told him that Afrin was inside the house of the accused and that Afrin had told him that the accused threatened to kill her. These omissions in our opinion, do not affect the credibility of this witness. We have no reason to disbelieve this witness.

18. P.W.6 Niyaskhan has also supported P.W.1 Shamabi and P.W.5 Nasirkhan.

19. That takes us to the evidence of P.W.8 Dr.Prakash Patil who examined the prosecutrix on 22 February 1988 at about 8 p.m. It is pertinent to note that the prosecutrix was examined immediately after the incident.

He has stated that he found presence of seminal stains on the clothes of the prosecutrix and on her genital. He has issued the certificate Exh.33. In the cross-examination he has stated that though in the absence of chemical examination he could not have said that the stains on the clothes were of semen or not, he could say so by feeling and smelling them. The relevant portion of the certificate issued by Dr.Patil may be quoted:

"8. Examination of the evidence of any violence on the body - Nil.

11. Presence of seminal stains on the genitals - present.

13. Smears for examination:

(a) Vaginal smeer for spematozoca - Yes.

(b) Urethrkl smeer for Gonococoi - No."

20. In this context it is necessary to see Chemical Analyser's report, which is at Exh.33. This report makes it clear that on the shirt (article 5) and salvar (article 6) of the prosecutrix semen stains were found. He also found semen stains on the lungi (article 1). The medical evidence and the Chemical Analyser's report

are clinching circumstances indicating the guilt of the accused.

21. Ms.Kaushik, the learned Counsel appearing for the accused argued that there is some confusion about the seizure of the clothes of the prosecutrix. P.W.1 Shamabi has stated in her evidence that the clothes on the person of Afrin were removed in the Civil Hospital, Nashik and her son Nasirkhan took them to the Police Station and produced them in the police station. She identified them as Muddemal Articles 3 and 4 (shirt and salvar). P.W.5 Nasirkhan has also identified the said clothes as clothes worn by Afrin. P.W.10 PSI Chavan has stated that he attached Muddemal Articles 3 and 4 which were produced by Shamabi under panchanama in the presence of two panchas. Exh.15 is the said panchanama. In the cross-examination he has denied the suggestion that the said clothes were produced by one Altaf before him. He has reiterated that the said clothes belong to the prosecutrix. The prosecution has also examined panchas to the panchanama Exh.13. P.W.3 Altaf has stated that Shamabi mother of the prosecutrix produced the shirt and salvar in the police station in his presence. In the cross-examination he has maintained that Shamabi gave the clothes at the police station. Much was tried to be made out of the statement made by

him that Shamabi gave the clothes to him at Civil Hospital at Nashik. In our opinion this is a minor inconsistency. It is obvious that salvar and shirt on the person of the prosecutrix were removed in the hospital where she was examined and thereafter they were handed over to the police at Bhadrakali Police Station. We cannot attach much significance to such minor discrepancy. Having read the entire evidence, we are more than convinced that the accused did try to commit rape on the prosecutrix. In our opinion, the conviction needs to be maintained.

22. The learned A.P.P. relied upon a judgment of the Supreme Court in **Rajendra Jawanmal Gandhi's case (supra)**. In this case, the accused was convicted under section 376 of the IPC and sentenced to undergo R.I. for 7 years and pay a fine of Rs.5,000/- by the trial court. However, the Division Bench of this court upset the conviction under section 376 of the IPC and instead convicted the accused for offence under section 354 of the IPC and sentenced him to suffer R.I. for the period which he had already undergone. However, the fine amount which was earlier Rs.5,000/- was increased to Rs.40,000/-. The Supreme Court converted the conviction of the accused from section 354 to that under section 376 read with section 511 of the IPC and directed him to

undergo full imprisonment of 7 years imposed on him by the trial court. While doing so, the Supreme Court described the crime of rape as not only a crime against the victim but against the whole society. The Supreme Court observed that heinous crime has been committed and the accused must suffer for his consequence. Relying on these observations of the Supreme Court, the learned A.P.P. urged that sentence should be enhanced.

23. It is true that the offence of rape is serious and must be viewed with great sensitivity. But sometimes, facts of a case may persuade a court to adopt not a very harsh approach. In **State of H.P. v. Mango Ram, (2000) 7 SCC 224**, the accused had committed rape on the prosecutrix who was a minor and who was related to him. The trial court acquitted the accused. The High Court confirmed the order of acquittal. When the appeal reached the Supreme Court, the Supreme Court was of the opinion that the Sessions Court and the High Court had treated the case lightly. The Supreme Court observed that the courts below should have shown greater sensitivity to such cases. The Supreme Court reversed the findings of the Sessions Court and the High Court and held the accused guilty for offence punishable under section 376 of the IPC. However, as regards the sentence, the Supreme Court took a lenient view because

the incident had happened in the year 1993. The Supreme Court observed that by the passage of time, the members of two families must have buried the hatchet, if any, arisen on account of this incident. Keeping in mind the possibility that a further order of custodial sentence at that distance of time may cause rupture to social harmony in the village life and may only help to rekindle the flames of anger which have been smouldering for so long between near relatives, the Supreme Court held that the sentence already undergone by the accused would be sufficient to meet the ends of justice.

24. In the present case, looking to the gravity of the offence, we would have enhanced the sentence of imprisonment but, we are informed by the learned counsel for the appellant that the prosecutrix is married and happily settled in Mumbai. The accused is also married and has four children. Sixteen years have elapsed after the date of incident. Considering the fact that both, prosecutrix and accused have settled in life and considerable time has elapsed from the date of incident, in the light of the judgment of the Supreme Court in **Mango Ram's case (supra)**, we are of the opinion that enhancement of fine would serve the ends of justice.

25. Hence we pass the following order:

(i) Appeal No.1017 of 1988 is dismissed. The conviction of the Appellant Razzak Shaikh @ Gaffar @ Mallu under sections 363, 376 read with sections 511 and 323 of the IPC is confirmed. Sentence awarded to him under sections 363, 376 read with section 511 of the IPC to suffer R.I. for a period of one year is also confirmed. Sentence of R.I. for three months awarded to him for the offence under section 323 of the IPC is also confirmed. Substantive sentences shall run concurrently. However, sentence of fine for offence under sections 363, 376 read with sectiosn 511 and 323 of the IPC is enhanced to Rs.25,000/-. In default of payment of fine, he has to undergo R.I. for a period of three months. Fine to be paid within a period of three months.

(ii) The accused is on bail. His bail bond stands cancelled. He should surrender to the police within six weeks to undergo the sentence.

(iii) Suo Motu Petition No.6 of 1988 and Criminal Appeal No.97 of 1989 are disposed of in the aforesaid terms.

(SMT. RANJANA DESAI, J.)

(A.S. OKA, J.)